No. 4285.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Charles Henry Pray,
Appellant,

vs.

W. B. Copes and J. E. Hill, Doing Business Under the Fictitious Name of Triangle Iron Works; and M. J. Fitzgerald and W. A. Samson, Doing Business Under the Fictitious Name of National Fire Escape Ladder Company,
Appellees.

PETITION FOR REHEARING.

RAYMOND IVES BLAKESLEE,
J. CALVIN BROWN,
Solicitors and Counsel for Appellant.

Parker, Stone & Baird Co., Law Printers, 232 New High St., Los Angeles.

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Now comes appellant Charles H. Pray, above named, and petitions this Honorable Court for a rehearing upon the following grounds and for the following reasons:

That this Honorable Court, in its opinion filed October 20, 1924, affirming the decree of the lower court, fell into misapprehension of law and fact in not reversing the decree of the lower court dismissing the bill of complaint, apparently upon and only upon the

failure of this Honorable Court to find that appellees omitted from their structure one element, and one element alone, of the claims of the Pray patent in suit, in true meaning and substance, to-wit, a fixed ladder extending between two balconies.

As we understand it, the appelleees have made no contention, and this Honorable Court does not indicate by its opinion, that all the other elements of appellant's claim are not present in appellees' structure. As we take it, the whole issue narrows, on the merits, to the proposition of whether or not appellees' fixed ladder structure *has enough rungs in it, or may have enough rungs in it,* to be denominated *a ladder.* We submit again that this question is completely solvable in favor of appellant by an application of the doctrine of suppressed or impaired function within the decision of King Ax Co. v. Hubbard, C. C. A. Sixth Circuit, 97 Fed. 795, 803, cited in our opening brief, opinion by Judge Taft, now Supreme Court Chief Justice.

If this fixed device, with its *rungs,* be even separately considered, what *can* it be named unless a ladder? And it has further the function of *guiding the ground ladder* in the patented combination and in appellees' structure. Is is wise patent law to make the test of infringement here how *many* rungs are used or *how far apart* they are? Would that be a proper test regarding pickets of a picket fence in a patented combination? Appellees have admitted under oath and by brief that the fixed part *is a ladder with rungs. Claim 1 calls for "platforms," not even balconies with railings and the rungs are certainly intermediate such "platforms" in appellees' device. The addition of railings is not controlling.*

We earnestly submit this question for the merely brief further consideration which we think it will require of Your Honors, and with no desire to overburden Your Honors during a term of court unusually lengthy. Mr. Pray is a poor man, and it has been with great financial difficulty that this case has been tried and appealed, and it would not have been had his counsel not been honestly and emphatically convinced that the doctrine above-mentioned was applicable to the case.

We believe that the reply brief in this case, while filed technically on time, did not reach Your Honors until the day your decision was handed down, and possibly had not been read when the opinion was formulated. Briefly, but with great pains, we set forth and recapitulated therein points, authorities and excerpts from testimony which we earnestly call to Your Honor's attention, in support of this petition; and we adopt said reply brief, (with further reference to the opening brief), with the above remarks and contentions, as the brief on this petition.

Respectfully submitted,

RAYMOND IVES BLAKESLEE,
J. CALVIN BROWN,
Solicitors and Counsel for Appellant.

I, Raymond Ives Blakeslee, the undersigned, hereby certify that in my judgment the foregoing petition is well founded, and it is not interposed for delay.

RAYMOND IVES BLAKESLEE,
Of Counsel for Appellant.